

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL E. WATSON
Claimant

VS.

SUPERIOR INDUSTRIES INTERNATIONAL
Self-Insured Respondent

)
)
)
)
)
)

Docket No. 1,012,668

MICHAEL E. WATSON
Claimant

VS.

TOWER METAL PRODUCTS
Respondent

AND

ACE USA
Insurance Carrier

)
)
)
)
)
)
)
)
)
)

Docket No. 1,012,669

ORDER

Tower Metal Products and its insurance carrier, as well as claimant, appealed the February 12, 2004, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant has filed two claims for work-related injuries. In one claim, claimant alleges he sustained a series of repetitive injuries to his left upper extremity through June 6, 2003, which was his last day of work for Tower Metal Products (Tower). In the other claim, claimant alleges he sustained a series of repetitive injuries to his left upper extremity through August 21, 2003, while working for Superior Industries International (Superior).

In the February 12, 2004, preliminary hearing Order, Judge Hursh held that Tower and its insurance carrier were responsible for providing claimant his workers compensation benefits as claimant's left upper extremity injury occurred while he was working for that employer. Conversely, the Judge held claimant did not sustain an accidental injury while

working for Superior. The Judge also denied claimant's request for temporary total disability benefits.

Tower and its insurance carrier contend Judge Hursh erred. They argue claimant is not credible and the Board should deny both claims. In the alternative, they argue claimant's employment with Superior created his present need for medical treatment and, therefore, Superior should be responsible for claimant's preliminary hearing benefits.

Superior responds by arguing that claimant's brief employment with it neither caused nor aggravated his left upper extremity injury. In the alternative, Superior argues claimant should not receive temporary total disability benefits as he falsified some of his employment documents. Accordingly, Superior contends the February 12, 2004, preliminary hearing Order was appropriate. In the alternative, Superior argues the Board should enter an order denying benefits in both claims or, at the minimum, deny claimant's request for temporary total disability benefits should the Board determine that Superior is responsible for claimant's injury.

Claimant contends Judge Hursh erred by finding claimant did not sustain injury while working for Superior and by failing to award him temporary total disability benefits. Claimant argues the medical evidence is uncontradicted that claimant sustained a work-related injury while employed by Superior.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with Tower through June 6, 2003?
2. Did claimant sustain personal injury by accident arising out of and in the course of his employment with Superior through August 21, 2003?
3. If claimant sustained personal injury by accident while employed by Tower and later by Superior, which employer is responsible for claimant's preliminary hearing benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The February 12, 2004, preliminary hearing Order should be reversed and this proceeding remanded to the Judge.

Claimant has a long history of symptoms in his left hand and forearm. According to claimant, those symptoms began during his first stint of working for Tower between 1998 and 2000. Tower provided claimant with medical treatment for his symptoms, which was diagnosed as tendinitis. But when claimant left Tower's employment in about 2000 to work for Ennis Business Forms, his left upper extremity symptoms mostly resolved.

After an approximate two-year absence, claimant returned to work for Tower around September 2002. Unfortunately, claimant's left upper extremity symptoms immediately recurred once he resumed lifting and handling the 20- to 30-pound aluminum ingots. When Tower terminated claimant in June 2003 for absenteeism, claimant continued to experience left upper extremity symptoms.

In approximately July 2003, claimant commenced working for Superior as a casting machine operator. That job required claimant to use pliers to lift aluminum wheels weighing 25 to 40 pounds. Claimant's left upper extremity symptoms worsened as he experienced more swelling in his left hand and fingers to the point he was unable to bend his fingers and his symptoms began waking him at night.

On August 6, 2003, claimant sought medical treatment from Dr. Steven R. Isaac. The doctor's office notes from that date read, in part:

This is a 33 yr old white male who comes in today with complaints of swelling of his left arm and hand for the past two weeks. He started a new job which involves operating heavy press about a week before that. He states that the symptoms are getting worse to the point that they wake him up at night. He has difficulty sleeping with swelling in his wrist and hands.¹

Later, Dr. Isaac recommended that claimant not return to his casting machine job. Consequently, in late August 2003, Superior terminated claimant's employment as it would not accommodate his upper extremity injury.

In October 2003, Dr. Edward J. Prostic examined claimant. In his October 13, 2003, report to claimant's attorney, Dr. Prostic noted the following history:

Mr. Watson reports injury from repetitious minor trauma stacking ingots at Tower Metal Products. He began getting more painful at his left wrist and hand and was sent to Mercy Physician Group Office where he was judged to have an overuse syndrome. Medicines and physical therapy were provided. The patient left Tower and had temporary employment elsewhere. During that time his symptoms resolved. He returned to Tower and had recurrent symptoms. He has left them and

¹ See P.H. Trans., Resp. Ex. 2.

is now working for Superior Industries where his symptoms have worsened. Presently, he is out of work.²

The Board concludes it is more probably true than not that claimant injured his left upper extremity by the work he performed for Tower through his last day of employment with that company on June 6, 2003. But the Board also concludes it is more probably true than not that claimant sustained additional injury or aggravation to his left upper extremity by the work he performed for Superior during July and August 2003.

An injured employee is entitled to receive benefits under the Workers Compensation Act when the employee's work merely aggravates a preexisting condition.³ The test is not whether the accident or work activity created the condition but, instead, whether the accident or work activity intensified, aggravated or accelerated the preexisting condition.⁴

The medical records introduced at the preliminary hearing indicate claimant first received medical treatment for his left upper extremity during his first stint with Tower. Claimant then went a number of years without receiving treatment for his left upper extremity until returning to Dr. Isaac in August 2003. The medical records, coupled with claimant's testimony, establish that the work claimant performed for Superior aggravated his left upper extremity symptoms.

Based upon the above, the Board finds the greater weight of the evidence establishes that claimant's present need for medical treatment is the result of the work he performed for Superior. Consequently, the February 12, 2004, preliminary hearing Order should be reversed to require Superior to provide claimant with his preliminary hearing benefits. Whether the work claimant performed for Superior permanently aggravated his left upper extremity condition or whether that work merely precipitated the need for medical treatment are questions to be addressed at the time of final award.

Claimant contends Judge Hursh erred by refusing to award temporary total disability benefits. The issue of whether claimant's medical status satisfies the definition of being temporarily and totally disabled is not an issue the Board has jurisdiction to review from a preliminary hearing order.⁵ The Judge, however, on remand should consider whether claimant is entitled to receive temporary total disability benefits from Superior.

² P.H. Trans., Cl. Ex. 1 at 1.

³ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

⁴ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁵ See K.S.A. 44-534a(a)(2).

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁶

WHEREFORE, the Board reverses the February 12, 2004, Order entered by Judge Hursh and orders Superior Industries International to provide claimant with appropriate medical treatment. The Board also remands this proceeding to the Judge to address whether claimant is entitled to receive temporary total disability benefits from Superior.

IT IS SO ORDERED.

Dated this ____ day of April 2004.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Troy A. Unruh, Attorney for Superior Industries International
Gary R. Terrill, Attorney for Tower Metal Products and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁶ K.S.A. 44-534a(a)(2).